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CHARLES ELMORE CROPL
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 786

SYDNEY A. TABER,

Appellant,

v.

STATE BOARD OF REGISTRATION AND EXAMINATION IN DENTISTRY OF NEW JERSEY,

Appellee.

STATEMENT OF APPELLANT OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

1. Appellee's motion to dismiss the appeal in this cause appears to be based in part on the proposition that since the (new) Supreme Court of New Jersey stated that it had "no occasion to review the determination of the Court of Errors and Appeals, supra, that the involved portion of the statute is . . . constitutional," appellant cannot maintain an appeal, since the latest decision of the New Jersey courts did not rule upon the constitutional question.

The Supreme Court of New Jersey is the successor to the New Jersey Court of Errors and Appeals as the highest court of New Jersey, and thus was merely stating that since it had remanded the case for fact-finding only, it would not, on the second appeal, review its own (in effect) prior decision on constitutionality. It is well settled that in such cases, there is a "final" judgment on constitutionality, even though the court on the second appeal declined to consider legal issues. *Great Western Telegraph Co.* v. *Burnham,* 162 U. S. 339; *McComb* v. *Commissioners of*

Knox County, 91 U. S. 1; *Gant* v. *Oklahoma City,* 289 U. S. 98.

2. Appellee also bases its motion to dismiss on the proposition that appellant did not challenge the portion of the statute held constitutional by the Court of Errors and Appeals. Appellee is in error on this point, but in any case this issue is irrelevant since the Court of Errors and Appeals *did* decide the constitutional question and specifically held this portion to be constitutional. It is "an elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a [state] court . . . when it appears that such question was actually considered and decided." *Manhattan Life Ins. Co. of N. Y.* v. *Cohen,* 234 U. S. 123; many cases could be collected to the same effect.

3. Appellee states that the question is not substantial. The question is as substantial, and as extensive, as the regulation of the professions in the forty-eight states. In the twenty years since *Liggett* v. *Baldridge,* 287 U. S. 105, there has been a virtual revolution in the state regulation of professions, with so-called "medical codes," "dental codes," etc., being enacted in many states. No guidance has come from this Court concerning the permissible limits of that kind of legislation since 1928. Little help is furnished in the abstract by such criteria as "unreasonable and extravagant," "wholly arbitrary," or "without due process of law," all of which are offered as guides by appellee, and only a definitive ruling by this Court will be of assistance.

Respectfully submitted,

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Attorney for Appellant.